IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

MISC. PETITION NO. 34 OF 2002

WITH

MISC. PETITION NO. 35 OF 2002

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M/S. SICOM LIMITED .. Petitioner.

vs.

Padmashri Mahipatrai

J. Shah & Ors. .. Respondents.

Mr. G.D. Utangale for petitioner.

Mr. V.J. Mehta i/by D. Mehta and Associates

for respondents.

CORAM : S.U.KAMDAR, J.

DATE : 13th April, 2005.

P.C.

1. These two petitions are filed under section 31 (1) (aa) of the State Financial Corporation Act against the guarantors. Since the facts as well as the contentions raised in both the present petitions are substantially identical, the same are disposed of by this common judgment. The facts are taken from misc. petition No. 34 of 2002.

2. The respondent nos. 1, 2 and 3 are the guarantors and for enforcement of their liabalities under the said guarantees, the present petitions are filed by the petitioners under section 31 (1) (aa) of the State Financial Corporation Act.

3. One M/s. Mehta Rubber Chemical Ltd,. was a company incorporated and registered under the Companies Act, 1956. This company is the respondent no. 4 in the present petition. The said respondent no. 4 made an application for sanction of the loan amount of Rs. 149 lacs towards the term loan. The same was sanctioned by the petitioner on the various terms and conditions one of which was to mortgage the entire plant, machinery and land and building of the said respondent no. 4 with the petitioner herein. The said amount was subsequently disbursed on 6.1.1995 and the company has availed of the said loan amount of Rs. 149 lacs. A deed of mortgage was executed on 6.1.1995. The respondent no. 4 thereunder created the first charge in favour of the petitioner in respect of the plot of land bearing plot No. T-133 in Tarapur Industrial Area of MIDC as well as the building and structure standing thereon along with the plant and machinery.

4. In consideration of disbursement of the said loan to the respondent no. 4 company the

respodnents no. 1 to 3 have executed personal guarantees on 6.1.1995 and assured the repayment of the dues by the company and undertook that in an event if the default is committed by the respondent no. 4 to make payment under the terms and conditions of the said loan agreement then in that event the respondent nos. 1 to 3 agree to make good the said payment under the said guarantee. It is an admitted position that out of the said Rs. 149 lacs sanctioned Rs. 147 lacs were disbursed to the respondent no. 4 and respondent no. 4 failed to make repayment of the amount as per the terms and conditions thereof. On 11.7.2000, a notice of demand was issued calling upon the respondent n. 4 to pay the outstanding arrears of instalment amount. However, inspite of the same no payment was forthcoming. Thereafter, a further notice was issued on 16.8.2001 and the petitioner once again called upon the respondent no. 4 to make payment of the then outstanding amount of Rs.42,86,191/-, the amount of instalments which were over due as on that date. Ultimately, the petitioner has recalled the said loan and exercised power under section 29 of the State Financial Corporation Act and took over the said property mortgaged in favour of the petitioner herein. Thereafter the guarantees were invoked by the petitioner which were executed by respondent no. 1 to 3. By their demand notice dated 23.4.2002 the petitioners called upon the

respondent nos. 1 to 3 to make payment of the said amount outstanding of Rs. 1,06,97,487/- The present petition is filed by the petitioner for the enforcement of the said guarantees. An additional affidavit has been filed dated 11.3.2005 inter alia pointing out therein that there is an outstanding amount due and payable by the respondent nos. 1 to 3 to the petitioner as well as IDBI of Rs. 1,80,40,815 together with interest at the rate of 22%. It has been stated in paragraph 3 of the said affidavit that after filing of the petition the mortgaged assets are disposed of and an amount of Rs. 75,23,647/- has been received by the petitioner towards net sale proceeds which the petitioner has given credit and thereafter the aforesaid amount of Rs. 1,80,40,815/- has been worked out with interest accrued in respect of the said amount.

4. The learned counsel appearing for the respondent has contended before me the following submissions.

. Firstly it has been submitted that under section 31 (1) of the State Financial Corporation Act this Court has no jurisdiction to entertain the present petition because it has been contended that the petition can only lie where the industrial concern carries on its business or substantial part of its business. It has been contended that the

respondent no. 4 company is not carrying on business from the address mentioned in the cause title and that was the earlier registered office of the respondent no. 4 being at Swastic Chambers, Sion-Trombay Road, Chembur, Mumbai 400 071 the same has been closed down and is shifted to Thane. I am not inclined to accept the aforesaid contention because the respondents have not filed any affidavit in reply to the present petition though the petition is of 2002. The cause title of the present petition mentions the address of the respondent no. 4 as under :-

> Having its registered office
> at 215-216, Swastik Chambers,
> Sion Trombay Road, Chembur,
> Mumbai - 400 071.

The averment in the petition pertaining to the jurisdiction are set out in paragraph 14 of the said petition. Same are set out hereinunder:-

> "14. The Petitioner submits that, the said Company is having its registered office at Bombay and substantial business of the company is being carried out at Bombay. The various facilities were sanctioned and disbursed at Bombay the same was repayable at Bombay. The Respondents have executed

> and delivered the Deed of Guarantees, which is the subject matter of the present petition at Bombay. The Respondents are residing and or carrying on their business in Bombay within the jurisdiction of this Hon'ble Court. The entire cause of action has arisen in Bombay and therefore this Hon'ble Court has jurisdiction to try and entertain the present petition."

5. In view of the fact that these averments are uncontroverted by the respondent I have to proceed on the footing that the office of the respondent no. 4 is in Bombay and the business of the respondent no. 4 is carried on within the local limits of jurisdiction of this Court. In a companion judgment in the case of Misc. Petition No. 11 of 2002 (SICOM Limited. vs. Co-Nick Alloys (India) Limited & Ors., the issue as to the jurisdiction has already been dealt with in detail. Apart therefrom in the present case also there is clause no. 18 in the deed of guarantee which reads as under :-

> "18. The Guarantors agree and declare that for enforcing this Guarantee by SICOM against them or any of them the Courts at Bombay only shall have exclusive jurisdiction and the Guarantors hereby submit to the same."

6. For the aforesaid reasons I am not inclined to accept the contention of the respondent nos. 1 to 3 that the respondent no. 4 is not carrying on any business within the jurisdiction of Bombay as it is settled law that jurisdiction issue has to be determined on the basis of the averments made in the petition as it is. There is no affidavit in reply filed and thus there is no controverting of the aforesaid averments. I am, therefore, required to proceed with the said averments as correct. Since I have taken the view in the aforesaid judgment in Misc. Petiton No. 11 of 2002 tht if the office of the industrial concern is situated within the local limits of this Court then this Court still have jurisdiction to entertain the claim, I am unable to accept the contention of the learned counsel for the respondent nos. 1 to 3 and I therefore reject the same.

7. The next contention raised is that the petitioner has disposed of all the assets of respondent no. 4 at throw away price and, therefore, under section 139 of the Indian Contract Act, the respondent nos. 1 to 3 are discharge. I am not inclined to accept the said contention also because the power exercised under section 29 by the petitioner has not been challenged by the company. The company has accepted the said sale. In view

thereof, the contention raised in the present petition by respondent nos. 1 to 3 without any material in support thereof by merely stating thatk the properties are sold at under valuation by itself cannot be accepted and therefore has to be rejected.

8. The third contention advanced by the learned counsel for respondent nos. 1 to 3 is that the petitioner has not instituted and enforced the liability of the respondent no. 4, being principal debtor, therefore, under section 134 of the Contract Act, the respondents are discharged. This contention is merely required to be stated to be rejected. It is now well settled that the liabilities of principal debtor and the guarantors are independent to each other and the responsibility to repay loan is joint and several and, therefore, the same can be enforced as against the guarantors even without initiating any proceedings as against respondent no. 4, principal debtor.

9. The next contention advanced by the learned counsel for the respondents is that the provisions of the guarantee which inter alia provides that the respondent nos. 1 to 3 have waived their rights under section 133, 134, 135, 139 and 141 of the Indian Contract Act is bad in law. It is contended tht the said waiver is not in consonance with law in as much as it is without any consideration and

therefore unenforceable contract in law. The said contention also cannot be accepted because it isnot raised by filing any affidavit in reply. In any event, in my view the guarantee is given in cosideration of loan amount lent and advanced. It is not required in law that there should be independent consideration for each of the clauses of the said guarantee. Thus the contention does not have any merits and required to be rejected.

10. It has been next contended that the respondent no. 1 to 3 executed a guarantee subsequent to the release of the financial assistance to the petitioner and, therefore, there was no consideration for execution of the guarantee itself. Section 23 of the Contract Act provides that post consideration is valid consideration and, therefore, the said submission made by the respondent nos. 1 to 3 are required to be rejected.

11. The next contention advanced is that the said claim is barred by law of limitation. In view of my judgment in Misc. Petition No. 49 of 1999 (Maharashtra State Financial Corporation v. Magna Elastomerics Rollers P. Ltd., and ors., delivered on 14.1.2005, the contention of limitation is required to be rejected because I have held that the period of limitation as against the guarantors starts only from the invocation of the guarantee by

the petitioner. The guarantee in the present case has been invoked on 23.4.2002 and the petition is filed on 16.9.2002 and, therefore, the said claim is within time and the contention raised of limitation by the respondents nos. 1 to 3 has no merits.

12. The next contention raised by respondent is that the petitioner has charged excessive rate of interest i.e. 23.5 % per annum on the principal amount. According to the learned counsel for the respodnents nos. 1 to 3 the said rate is exorbitant and that the petitioner is not entitled to charge the same. The said contention cannot be accepted. The petitioner is the financial institution and, they are entitled to charge the rate of interest which is agreed upon between the parties. It is not disputed tht the 23.5% rate of interest is an agreed interest under the loan agreement between the petitioner and respondent no. 4. The liability of the guarantors is also the same as that of a principal debtor.

13. The next contention advanced by the respondent no. 1 to 3 is that the court fees is liable to be paid on the amount claimed in the petition. In support of the aforesaid contention the respondents no. 1 to 3 has relied uopn the judgment of the Apex Court in the case of Gujarat State Financial Corporation vs. Natson Manufacuring

Co. Pvt. Ltd., and others reported in (1979) 1 SCC 193. In my view the aforesaid contention is no longer a res integra in view of the judgment of the Apex Court in the case of Maharashtra State Financial Corporation vs. Jaycee Drugs and Pharmaceuticals Pvt. Ltd., and others reported in 1991 (2) SCC 637 The said judgment in fact deals with identical contention as raised by the respondents no. 1 to 3 by relying upon the provisions of section 31 (1) (aa) and,therefore, the said contention is devoid of any merits and liable to be rejected.

14. The next contention is that the claim is also disputed on merits tht is about the quantum of claim. There is no material produced either by way of a reply or otherwise to show that the said claim is not correct. The petitioner has given detailed figures and thus according to me the said claim is liable to be accepted and necessary order is required to be passed.

15. In the aforesaid circumstances, I allow the present petition and direct that the respondent nos. 1 and 3 to make payment to the petitioner of a sum of Rs. 1,80,40,815 with further interest at the rate of 12% per annum till payment and/or realisation. However, there shall be no order as to costs.